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JUL 02 2012

United States Bankruptcy Court  
San Jose, California

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re ] Case No. 11-57848-ASW  
] BRUCE C. WILLIAMS, ] Chapter 13  
] Debtor. ]  
]-----]  
] BRUCE C. WILLIAMS, ] Adv. Proc. No. 11-5336  
] Plaintiff, ]  
] vs. ]  
] ONEWEST BANK/INDYMAC BANK, ]  
] Defendant. ]

**MEMORANDUM DECISION GRANTING MOTION TO DISMISS, WITHOUT PREJUDICE**

This matter comes before the Court on a Motion to Dismiss Adversary Complaint filed by Defendant OneWest Bank, named in the complaint as Defendant OneWest Bank/Indymac Bank (hereafter "Defendant"), represented by attorney Kim Bui. Plaintiff Bruce Williams (hereafter "Plaintiff"), who commenced this action pro se but is now represented by attorney Lyle Johnson, opposes the motion. The Court has considered all of the parties' papers with regard to the instant motion and finds that there is no need for

1 oral argument. For the following reasons, the Court grants the  
2 motion to dismiss, without prejudice, and will give Plaintiff an  
3 opportunity to file an amended complaint now that Plaintiff has the  
4 benefit of legal counsel.

5 In this adversary proceeding; which Plaintiff commenced on  
6 November 30, 2011, Plaintiff's claims are premised upon an  
7 anticipated trustee sale of real property located at **1899 Concourse**  
8 **Drive in San Jose, CA.** In addition to claiming a violation of the  
9 automatic stay and alleging violations of the Truth in Lending Act  
10 and the Real Estate Settlement and Procedures Act (hereafter  
11 "RESPA"), Plaintiff also asserts numerous claims under state law  
12 for fraud, quiet title, reformation, and violation of various  
13 California statutes. Plaintiff seeks monetary, declaratory, and  
14 injunctive relief.

15 The motion to dismiss is premised upon several different rules  
16 of civil procedure. Defendant contends that the complaint fails to  
17 comply with Fed. R. Bankr. P. 7008 and Fed. R. Civ. P. 8(a)'s  
18 requirement that the statement of claims be short and plain.  
19 Invoking Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(1),  
20 Defendant contends that Plaintiff lacks standing to assert claims,  
21 because Plaintiff was not the borrower on the loan for real  
22 property located at **209 North Winchester Blvd, Santa Clara, CA** -- a  
23 property which is also mentioned in the complaint. As for the  
24 fraud claims, Defendant asserts that Plaintiff did not plead fraud  
25 with the particularity required by Fed. R. Bankr. P. 7009 and Fed.  
26 R. Civ. P. 9(b). With regard to any RESPA claim, Defendant moves  
27 for dismissal on the grounds that Plaintiff has failed to state a  
28 claim for relief under Fed. R. Bankr. P. 7012 and Fed. R. Civ. P.

1 12(b)(6). Defendant further contends that Plaintiff cannot seek to  
2 set aside the nonjudicial foreclosure without tendering loan  
3 proceeds, and that the sale did not violate the automatic stay  
4 because the bankruptcy court granted in rem relief before the sale.  
5 Defendant also makes other arguments for dismissal of the state  
6 statutory claims which appear to fall under Rule 12(b)(6).

7 In Plaintiff's opposition, Plaintiff contends that because the  
8 complaint was filed pro se, the complaint should be held to less  
9 stringent pleading standards and all allegations in the complaint  
10 should be liberally construed. Plaintiff contends that, now that  
11 Plaintiff has counsel, if there are any deficiencies with the  
12 complaint, Plaintiff should be given an opportunity to amend.  
13 Plaintiff also argues that Plaintiff has standing to challenge the  
14 foreclosure because Plaintiff had an ownership interest in the  
15 property. Further, Plaintiff contends that the complaint complies  
16 with Rule 8(a), and Plaintiff -- as a pro per litigant -- did the  
17 best Plaintiff could to pinpoint all issues, allegations, and  
18 injuries. Plaintiff also argues, in general terms, that fraud was  
19 alleged with the requisite particularity, and that Plaintiff has  
20 adequately pled the remaining claims.

21 In reply, Defendant requests dismissal with prejudice on the  
22 basis that the response fails to adequately address the points  
23 raised in the motion to dismiss, and Plaintiff can assert no  
24 legally supportable theories in an amended complaint. Defendant  
25 also appears to contend that the Court should not consider  
26 Plaintiff's late-filed opposition, because Plaintiff or Plaintiff's  
27 attorney had sufficient notice of the motion in order to prepare a  
28 timely opposition.

1       The Court will grant the motion to dismiss, without prejudice,  
2 but finds it unnecessary to reach all of the arguments raised in  
3 the motion. First, as Defendant contends, the complaint does not  
4 comport with Fed. R. Civ. P. 8(a). Rule 8(a) provides that a  
5 pleading which states a claim for relief must contain a short and  
6 plain statement of the claim showing that the pleader is entitled  
7 to relief. In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56  
8 (2007), the Supreme Court explained that a short and plain  
9 statement of the claim is necessary "in order to give the defendant  
10 fair notice of what the ... claim is and the grounds upon which it  
11 rests[.]"

12       The complaint does not comply with rule 8(a) in several  
13 respects. First, it is wholly unclear to the Court which piece of  
14 real property is at issue in this case. This confusion is evident  
15 given that the motion to dismiss and the request for judicial  
16 notice accompanying the motion pertain entirely to real property  
17 located at **209 North Winchester Blvd, Santa Clara, CA**, which is  
18 mentioned in the complaint on page 10. However, page 1 of the  
19 complaint states that Plaintiff seeks to stop a trustee sale of  
20 property located at **1899 Concourse Drive in San Jose, CA**.  
21 Plaintiff alleges: "Comes now Plaintiff, filed the chapter 13 (Case  
22 No. 11-57848) to stop the 'trustee sale' (of **1899 Concourse Drive,**  
23 **San Jose, CA** 95131 ('Subject Property'))." There are repeated  
24 references in the complaint to the "subject property," but because  
25 of the reference on page 10 to the North Winchester property, it  
26 remains unclear which property is really at issue in the  
27 litigation.

28

1       The complaint -- at 61 pages -- is also needlessly long. Rule  
2 8 does not impose a limit on the length of a complaint, and  
3 verbosity, alone, is not a basis for dismissing a complaint. See  
4 Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637  
5 F.3d 1047, 1058 (9th Cir. 2011). However, a complaint that is  
6 "argumentative, prolix, replete with redundancy, and largely  
7 irrelevant" can be dismissed for failure to comport with the "short  
8 and plain" pleading requirements of Rule 8. Id. (Citations  
9 omitted). Part of the rationale for dismissing a needlessly long  
10 and confusing complaint is that courts "are busy enough without  
11 having to penetrate a tome approaching the magnitude of war and  
12 peace to discern a plaintiff's claims and allegations." Id.  
13 Another reason is that such a complaint can be prejudicial to a  
14 defendant by making it difficult to admit or deny allegations and  
15 to determine what claims are being litigated. Id. The Ninth  
16 Circuit has stated on many occasions that clear and concise  
17 averments are necessary to let a defendant know exactly on what  
18 grounds the defendant is being sued. McHenry v. Renne, 84 F.3d  
19 1172, 1178 (9th Cir. 1996).

20       That said, there is no magic number of pages which renders a  
21 complaint needlessly long. Courts have dismissed 23-page  
22 complaints, see Nevijel v. North Coast Life Ins. Co., 651 F.2d 671  
23 (9th Cir. 1981), to 70-plus-page complaints, see Hatch v. Reliance  
24 Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985), to 733-page  
25 complaints, see Cafasso, 637 F.3d at 1052-53. In doing so, courts  
26 consider the prolix and confusing nature of the complaints and  
27 whether the complaints contain legal arguments rather than factual  
28 allegations. For instance, in Wyoming v. United States, 279 F.3d

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1 1214, 1222 n.7 (10th Cir. 2002), the Tenth Circuit Court of Appeals  
2 observed that the complaint ran afoul of Rule 8(a) because it  
3 contained "excessive legal argument and conclusions interspersed  
4 with factual allegations, jurisdictional claims, and citations to  
5 authority."

6 There are numerous paragraphs in the complaint devoted to  
7 legal argument. The law is obviously relevant and should be  
8 briefed in the context of a motion to dismiss or for summary  
9 judgment, but a detailed recitation of the applicable law --  
10 especially to the degree present in the complaint -- is not  
11 appropriate.

12 In addition to the problems with the complaint under Rule 8,  
13 regardless of which property is at issue, Plaintiff cannot claim a  
14 violation of the automatic stay with regard to any nonjudicial  
15 foreclosure of either property mentioned in the complaint. In  
16 Plaintiff's main bankruptcy case (Case No. 11-57848-ASW), on March  
17 23, 2012, and on a motion filed by creditor East West Bank, the  
18 Court granted in rem relief from the automatic stay with regard to  
19 the property located at 1899 Concourse Drive in San Jose, CA. The  
20 Court terminated the automatic stay for this property not only for  
21 East West Bank, but also with regard to any assignees or  
22 successors-in-interest of East West Bank. The written order  
23 granting in rem relief was issued April 7, 2012, but nonjudicial  
24 foreclosure of the Concourse Drive property after March 23, 2012,  
25 could not violate the automatic stay.

26 As for the property located at 209 North Winchester, the Court  
27 takes judicial notice of an Order issued in the bankruptcy case of  
28 Leon Duette, Case No. 11-52721-ASW, granting in rem relief from

1 stay for the North Winchester property effective July 12, 2011, in  
2 a written order issued August 1, 2011. Thus, nonjudicial  
3 foreclosure of the North Winchester property after the Court  
4 granted in rem relief from stay could not violate the automatic  
5 stay.

6 To the extent Plaintiff asserts claims of fraud, Plaintiff did  
7 not particularly plead such claims. When claims of fraud are  
8 asserted, a plaintiff's burden of pleading facts is heightened. Not  
9 only must a plaintiff's complaint comport with Rule 8(a), but under  
10 Fed. R. Bankr. P. 7009, which incorporates Fed. R. Civ. P. 9 and,  
11 most significantly, Rule 9(b), "the circumstances constituting  
12 fraud" must be pled with particularity. Under Rule 9(b),  
13 allegations of fraud must be "specific enough to give defendants  
14 notice of the particular misconduct ... so that they can defend  
15 against the charge and not just deny that they have done anything  
16 wrong[.]" Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir.  
17 2009) (cites and quotes omitted). Pleading fraud with  
18 particularity requires pleading "the who, what, when, where, and  
19 how" of the alleged fraudulent acts. Id.

20 Plaintiff makes sweeping assertions of fraud in the complaint,  
21 but offers no specifics. Plaintiff alleges no particular dates on  
22 which particular people engaged in particular acts constituting  
23 fraud, and mentions none in opposition to the motion. Such factual  
24 allegations are required in order to properly plead a claim of  
25 fraud.

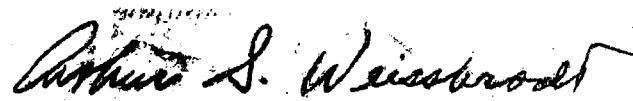
26 Therefore, the Court grants the motion to dismiss, but does so  
27 without prejudice. The Court appreciates that Plaintiff filed the  
28 original complaint pro se, and Plaintiff subsequently found an

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1 attorney to represent Plaintiff in this matter. Therefore,  
2 Plaintiff shall have the option of preparing a new, more concise  
3 pleading. Plaintiff shall have 45 days from the date of this Order  
4 to file an amended complaint. The hearing set for July 3, 2012 at  
5 2:15 p.m. is vacated.

6 IT IS SO ORDERED.

7 Dated: July 2, 2012



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9 ARTHUR S. WEISSBRODT  
10 UNITED STATES BANKRUPTCY JUDGE  
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